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IN THE SUPREME COURT OF THE UNITED STATES

December Term, 1976

No. 76-799

NATIONAL LABOR RELATIONS BOARD,

Respondent

-vs-

ALBERTS, INC., and DETROIT SHOE COMPANY,

Petitioner

RETAIL AND DEPARTMENT STORE EMPLOYEES, AMALGAMATED CLOTHING, WORKERS OF AMERICA, AFL-CIO,

Intervenor

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PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

ALBERTS, INC. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case which affirmed the decision of the National Labor Relations Board.

Opinion Below

The opinion of the Court of Appeals, which is unreported, is appended to this petition.[1] The opinion of

[1] The appendix to this Petition contains the decisions below and relevant portions of the record.

the National Labor Relations Board, a copy of which is appended to this petition, is reported at 213 NLRB No. 94.

Jurisdiction

The jurisdiction of this Court is invoked under 28 USC §1254. The judgment of the Court of Appeals was entered on September 28, 1976.

Questions Presented for Review

1. Whether the Court of Appeals erred in affirming the certification of a collective bargaining unit comprised of a single store out of a 48-store chain.

2. Whether the Court of Appeals erred in holding that a rule limiting solicitation promulgated by petitioner, a retailer, was invalid because of certain language in the rule which has never been asserted as a basis for invalidity by any other circuit court.

Ordinances and Constitutional Provisions Involved

This case involves application of Sections 8(a)1, 8(a)5 and 9(b) of the National Labor Relations Act as amended, 29 USC §151, et. seq. ("Act"), the relevant portions of which provide:

> Sec. 8(a) It shall be an unfair labor practice for an employer —
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> Sec. 9(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for

> the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Statement of the Case

The United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in affirming the decision of the National Labor Relations Board ("Board") ruled contrary to every other circuit court which has decided the appropriateness of a collective bargaining unit in a multi-store retail chain and the validity of a "no-solicitation rule", issues which are of real import to the law of labor relations. The issues presented by this case represent important policy considerations with respect to labor relations in a retail enterprise, and are of general significance to that portion of the economy. Moreover, the decision of the D.C. Circuit is in direct conflict with decisions of other circuits. The Supreme Court should end the conflict and thus eliminate the uncertainty and instability in the field of labor relations created by the split of authority now established by the D.C. Circuit.

A. Facts Relating to Unit Determination

1. Background.

Alberts, Inc. ("petitioner", "Alberts" or "company")[2] owns and operates a chain of women's clothing stores. At the time of the Board hearing in this case in September 1973, Alberts owned 48 stores, 24 of which were in the Detroit metropolitan area. There were approximately 470 persons employed by Alberts in those 24 Detroit area stores. On March 6, 1973, the Retail and Department Store Employees, Amalgamated Clothing Workers of America, AFL-CIO ("union") filed a petition for representation of all selling and non-selling

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[2] Detroit Shoe Company operates a ladies' shoe department in certain of Alberts stores and is considered a joint employer.

employees employed at the Alberts store in the Universal City Shopping Center in Warren, Michigan ("Universal store") which is located in the Detroit metropolitan area. On March 23, 1973, a representation hearing was held in Detroit wherein the principal issue raised was whether the single Universal store with 23 employees constituted an appropriate unit for collective bargaining purposes within Section 9(b) of the Act. The Regional Director for the Seventh Region of the National Labor Relations Board ruled that the single store unit was appropriate. The Board subsequently denied Alberts' Request for Review of that decision.

In May 1973, the union filed a petition for representation of Alberts' employees in its store in the General Motors Building, Detroit, Michigan ("GM store"). The Regional Director, following the precedent of the Universal case, ruled that the single store unit which employed only six people was appropriate. Again, Alberts' Request for Review was denied by the Board.

The company refused the union's demand for bargaining at the Universal store and the union began the unfair labor practice proceeding. The Board's Administrative Law Judge, although refusing to relitigate the unit issue in the unfair labor practice case, did take judicial notice of the records in both the Universal and GM store cases (App. 37, 38)[3]. The Board and the D.C. Circuit both affirmed the original unit determination of the Regional Director.

The evidence presented at the Universal and GM representation hearings unequivocally establishes that the formulation and administration of Alberts' labor policy and the decisions regarding store operations in the Detroit metropolitan area are handled on a highly centralized, uniform basis. In view of such facts, the Regional Director erred in holding that a single store out of Alberts' chain constitutes an appropriate unit. The Board, which never fully considered the facts,

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3 References to the record reproduced in the appendix are designated (App.).

perpetuated the error by denying Alberts' Request for Review. It is the D.C. Circuit's affirmance of this erroneous unit decision which forms the basis for the principal point on which Supreme Court review is sought.

2. Alberts' Labor Policy is Formulated and Administered in a Centralized Manner.

Alberts' labor policy is established and administered with respect to all stores in the chain on a uniform basis out of Alberts' main office in Ferndale, Michigan which is within the Detroit metropolitan area. (Decision of Regional Director in Universal case; App. 27-36). Individual store managers have no authority to modify this policy. The store manager's responsibility is limited to the day-to-day operation of the store. Many decisions, especially those regarding personnel matters are controlled by one of the three district supervisors responsible for the 24 stores in the Detroit area.

Alberts' payroll is centrally managed and all decisions relative to both pay rates and fringe benefit levels are made by the President of the company (App. 72, 73). Alberts has standard starting rates for all job classifications, and a store manager must get explicit approval from his district supervisor before any variation from these basic rates is granted (App. 67, 68, 78, 79, 82-83). Further, if a store manager wishes to grant any of his employees a merit raise, he must first get the approval of his district supervisor.

All fringe benefits are also centrally determined. Vacation time, sick leave, holiday pay, health insurance and employee discounts for employees in the stores are determined by the payroll department of Alberts' central office in Ferndale (App. 61). These benefits are uniform throughout the entire Detroit metropolitan area. (App. 60, 73-75).

Individual store managers do not have authority to hire or fire employees without first consulting with both the district supervisor and Alberts' director of security. Applications for employment are initially submitted by store managers to the district supervisor (App. 63, 64).

If an applicant is approved by both the district supervisor and security director, a job offer is made. In no instance is a store manager permitted to hire an applicant without following this uniform procedure. Similarly, decisions to discharge or lay off may not be made by a store manager independently. All such decisions must be approved by the district supervisor.

Even routine functions such as the establishment of store hours and the scheduling in the individual stores are determined by district supervisors rather than by the individual store managers (App. 80-82). The supervisors review, and on occasion, change, scheduling determinations made by an individual store manager. Although the manager does decide which specific employee schedules are to be changed, this function is essentially ministerial, as the decision as to the number and nature of schedule changes is always made by the district supervisor (App. 84, 85).

The company has an informal grievance procedure under which all employees are encouraged to take their grievances to the district supervisors or executives of the company, up to and including Alberts' President. All store managers know that they are answerable to their district supervisors and Company executives for any conduct on their part giving rise to an employee grievance (App. 85-87).

3. Decisions with Respect to Store Operations are Centrally Made.

The evidence presented at both of the representation hearings shows without question that Alberts' operations in the Detroit area are highly centralized, with company executives and district supervisors directing the operations of the individual stores, and with individual store managers having authority to act independently on only the most minor and routine matters. It is the responsibility of district supervisors to insure that operations remain uniform throughout the entire Alberts' system (App. 50, 71, 80, 81).

Alberts employs approximately 12 buyers who work

out of the Ferndale office. It is the function of the buyers to visit each store, determine its needs and purchase the necessary merchandise. All decisions with respect to purchases and pricing of merchandise are made by the buyers (App. 70, 71, 76, 77). No store manager ever makes a decision with respect to the nature or price of merchandise in a store (App. 50-52). In addition, all advertising is handled centrally. A store manager cannot place an advertisement independently (App. 54). All warehousing operations are handled centrally out of the company warehouse in Ferndale. There is no warehousing function carried on by any individual store (App. 54).

The company employs a credit executive who processes and reviews all credit applications. The only function a store manager has with respect to the extension of credit is to forward an application to the company office. A store manager can then accept credit only when the customer has a credit card issued by the company (App. 54-55). If customers are delinquent in their payments, collections are handled exclusively by the central office (App. 54).

In addition to the centralized operations described above, Alberts utilizes a number of other company-wide systems which directly bear on store operations and working conditions of store employees. For example, Alberts utilizes outside "shoppers" who shop at company stores and evaluate store operations and the performance of store personnel (App. 58). The reports of the "shoppers" are evaluated by the district supervisors and then reviewed with the store managers. The use of this service aids the company in making employment determinations and is further evidence of the store manager's restricted authority with respect to such determinations.

Further evidence of company-wide control of store operations is the company's use of a single person, from company headquarters, to train and supervise all store cashiers. She trains each new cashier in the operation of the cash-register and the preparation of daily cash reports. In addition, she handles the transfers of cashiers

between stores (App. 52, 53). Alberts has a security policy applied uniformly throughout the company chain (App. 59).

4. Employees and Merchandise are Frequently Transferred Among the Alberts Stores in the Detroit Area.

On a number of occasions there has been a need to transfer personnel both permanently and temporarily among Alberts' various store locations in the Detroit area. As a result of store closings and openings, changes in business, and promotional activities, there is a great deal of mobility of employees among the 24 stores. All decisions with respect to transfers are made by Alberts' personnel director and the district supervisors. Store managers do not determine when a transfer is to be made or which employee is to be transferred (App. 66).

The interchange of company employees between stores is a common occurrence. In two instances following store closings the employees of the closed stores were permanently transferred to other company stores (App. 56, 57). Temporary transfers between stores in and around Detroit is also occasioned by illness, vacations, store openings, and special promotions, such as "Downtown Detroit Days" (App. 56, 57, 62).

From both the number of transfers and the number of people involved in the transfers, it becomes clear there is a substantial interchange of company personnel and that such interchange is an integral part of the overall company operations.

In addition to employee transfers, there is a great deal of merchandise transfer handled by the central office. Alberts operates a "unit control" out of its Ferndale office for the purpose of transferring merchandise among the various stores (App. 65). When a store needs a certain item but does not have it in stock, the employee at the store who needs the merchandise calls "unit control" to find out which store has the item. During March and April 1973 there were 73 transfers of goods to and from the GM store alone. It was estimated that each transfer required about four interstore phone

calls (App. 69). The frequent transfers are indicative of the highly-integrated nature of Alberts' operations. The system for the interstore transfer of merchandise is significant to the unit determination because of the substantial amount of contact between sales employees of the various stores which is required thereby.

5. Factual Summary

In every aspect of Alberts' operations, including the establishment of labor policy and administrative decision-making, one factor is prevalent: there is a substantial centralized control which is not merely theoretical, it is applied on a daily basis. The records in the representation hearings which include the testimony of all levels of company management demonstrate that (1) individual stores and store managers do not have significant autonomy; (2) most aspects of store operations are governed centrally; (3) all decisions with respect to employment practices are centrally made; and (4) there is substantial interchange of employees among the Detroit-area stores, both permanent and temporary.

The combination of the factors listed above, along with the proximity of the 24 Detroit area stores, in view of recent decisions concerning bargaining unit appropriateness dictate that a single store unit is inappropriate.

B. Facts Relating to Alberts' "No-Solicitation" Rule

In late February, 1973, the management of Alberts first became aware of union activity in a number of its stores in the Detroit metropolitan area (App. 44). The company was concerned with the maintenance of retail operations without undue interruption from union organizing activity. During previous union organization campaigns, Alberts experienced disruption of its operations and "disservice to customers" (App. 46, 47).

The company advised all employees in the Detroit area stores of their rights with respect to union activity and restated in writing the long-standing company rule prohibiting solicitations during working hours on the

selling floor (App. 48). A two-page memorandum (App. 39, 40) outlining those rights and explaining the applicability of the no-solicitation rule to union activity was distributed to all the employees in those stores.

The memorandum restating the rule against solicitation provides in pertinent part:

> During the time that the union is trying to organize the employees, the company will expect employees to render their usual good service to the company and union organizers will not be allowed to discuss the union during working hours on company property. Employees who desire to discuss the union between themselves may do so during non-working hours, making sure that their discussions do not interrupt their normal work. (emphasis added)

Alberts had maintained a policy prohibiting solicitation or other work-interrupting activity on its selling floors for as long as any witness was able to recall (App. 42, 43, 46-49). As a result of management's concern that union solicitation would be likely to distract employees to the detriment of service to customers, the no-solicitation rule was published to inform all employees that certain union activity was encompassed by the rule (App. 44-47). The Board held that the rule is invalid on its face. This holding which was affirmed by the D.C. Circuit is contrary to all other circuit court decisions considering the validity of no-solicitation rules, particularly in view of the latitude given retail businesses with respect to the implementation of such rules.

REASONS FOR GRANTING THE WRIT

A. The Decision Below is Contrary to the Principle Established by the Various Circuit Courts that Single Store Units are Inappropriate in a Multi-Store Centralized Operation.

Alberts was found to be in violation of Section 8(a)(5) of the Act for refusing to bargain with the union. That refusal, however, was perfectly proper as the single store unit was inappropriate. The D.C. Circuit's decision in this case, which actually affirmed the decision of the Regional Director (the Board itself never fully considered the unit issue as Alberts' Requests for Review in the representation proceedings were denied and "relitigation" of the issue was not permitted in the unfair labor practice case), is directly contrary to the prevailing view among the various circuit courts. The decision creates the ludicrous possibility of 48 separate bargaining units within a centralized retail operation with a uniform labor policy.

The basic considerations involved in determining the appropriateness of a multi-store, as opposed to a single store unit, were summarized by the Sixth Circuit Court of Appeals in Wayne Oakland Bank v. NLRB, 462 F2d 666 (CA 6, 1972), a case involving a multi-branch bank operating in the Detroit metropolitan area. The Court said at pages 667-668:

> Each of the cases which has considered the issue of the appropriateness of a bargaining unit has focused on the nature and extent of centralization of operations. The courts have found that the most important factors entering into the determination of the unit are: First, the extent of the centralized control of the commercial and administrative aspects of the business and, Second, the extent of centralized control of labor policy. This second factor involves consideration of where matters subject to collective bargaining, such as wage and fringe benefits, are determined, i.e., whether the responsibility resides in the main office or with

> the branch supervisor. In addition consideration must be given to the extent of employee interchange between branches. The courts have not hesitated to set aside a finding of the appropriateness of a branch as a bargaining unit where evidence showed centralized control over the principal aspects of operations and employee relations. NLRB v. Purity Food Stores, Inc., 376 F2d 497 (CA 1, 1967); NLRB v. Davis Cafeteria, Inc., 396 F2d 18 (CA 5, 1968); NLRB v. Solis Theatre Corp., 403 F2d 381 (CA 2, 1968); NLRB v. Pinkerton's, Inc., 428 F2d 479 (CA 6, 1970). (emphasis added)

The application of the principles set forth in the Wayne Oakland Bank decision to the facts of the Alberts' operation — namely, centralized control over store operations; constant interchange of employees and merchandise; centralized control over all subjects of collective bargaining— unequivocally demonstrates that a single store unit, the Universal Mall store, is inappropriate. The contrary decision below cries out for reversal, as it is inapposite to the authorities and contrary to any notion of equity and common sense.

The Regional Director's determination that the Universal store is an appropriate bargaining unit, is based in large part upon the conclusion that the individual store managers are "clothed with substantial autonomy". The record discloses, however, that the only managerial decisions not subject to approval by a district supervisor or company executives are the granting of small merit raises, the selection of employees to be affected by a schedule change ordered by the company and the normal day-to-day supervision of work.

It has been repeatedly held that such limited authority on the part of an individual store manager, in a highly centralized operation, will not render an otherwise inappropriate single store unit appropriate. In NLRB v. Solis Theatre Corp., 403 F2d 381 (CA 2, 1968), where the union sought a unit consisting of one theatre in a theatre chain, the Second Circuit Court of Appeals said at page 383:

> In large part, the Board based its unit determination on the role of the local manager of (the single theatre), but the evidence shows that his authority is limited to little more than overseeing the daily activities of the employees. For example, he disciplines and reprimands employees, initially interviews job applicants, although the final decisions on hiring and firing are made by (the central office), and prepares and submits vacation schedules for approval by (the central office). It appears, therefore, that instead of being in a decision making position, the 'manager' has little or no authority on labor policy but is subject to detailed instructions from the central office.

Similarly, although an Alberts' manager has a certain amount of minor authority, he is, like the manager of a Solis theatre, subject to "detailed instruction" from the central office, with no authority to resolve on his own issues which would be the normal subject of collective bargaining.

The Fifth Circuit Court of Appeals faced a similar situation in NLRB v. Davis Cafeteria, Inc., 396 F2d 18 (CA 5, 1968), where the union sought certification of a unit consisting of two out of a chain of eight cafeterias. After reviewing the factors relied upon by the Board in its decision to splinter the unit, the Court said at pages 20-21:

> Notwithstanding these most compelling facts, the Board determined that each cafeteria manager had sufficient autonomy to render each cafeteria an appropriate unit. An examination of the factors upon which reliance was placed, in light of the entire record, demonstrates that they do not constitute any sort of local managerial authority over substantive subjects of collective bargaining. While the local manager does have authority to order food and supplies for his cafeteria, the record is clear that he may only use a list of suppliers and prices issued by the general office. Both the general office and

the local managers have authority to hire and fire employees, but the fact that the local manager has this authority does not alone make his cafeteria an appropriate unit. NLRB v. Frisch's Big Boy Ill-Mar., Inc., 356 F2d 895 (CA 7, 1966). The manager may obligate the company's credit, but only for certain cleaning supplies within a limit set by the general office. Managers do not have authority to grant wage increases, but may recommend raises to the general office. Each cafeteria has a separate bank account, but the manager has no authority to draw on it.

. . .

In the circumstances of this case, labor policy is centrally determined, and where local managers do not have authority to decide questions which would be subjects of collective bargaining, the two respondent cafeterias do not constitute an appropriate bargaining unit. (emphasis added)

The manager of a Davis cafeteria had, in areas such as discipline and ordering of merchandise, greater authority than the manager of an Alberts store. Yet, the lack of authority in the managers to determine collective bargaining-type issues mandated a finding that individual cafeteria units, comparable to the individual Alberts stores in the present case, were inappropriate.

In NLRB v. Frisch's Big Boy Ill-Mar, Inc., 356 F2d 895 (CA 7, 1966), relied upon by the Davis court, the Seventh Circuit Court of Appeals reversed the Board's certification of a single-restaurant unit out of a chain of ten restaurants. (The Board decision which was reversed was cited below by the Board as support for the single-store unit determination). The Board in the Frisch's case had based its decision on the authority exercised by the individual manager. The Court held, however, that when the exercise of these powers was at every point subject to the authority of an area supervisor, such authority could not justify a single-restaurant unit. The Court said at pages 896-897:

The only factual contention made by petitioner which requires notice is that each restaurant has 'autonomy' because each restaurant manager has certain powers. However, the undisputed facts appearing in the record show that a common labor policy affecting all employees is formulated and administered by the president, as chief executive, and certain other officers of the corporation. Reporting to him are three area supervisors each of which has a share of the Indianapolis restaurants to cover. The area supervisors visit the restaurants frequently. The managers' duties include the telephoning to local suppliers who have been selected and have entered into agreements negotiated by the president. The managers receive supplies and forward invoices, and cash sales records to the general office each day.

From the record it appears that the rules of eligibility and procedures affecting employment applications are established by the president for all restaurants. Uniform hiring rates are set by him. While a manager may hire an employee for his own store, he may not agree to pay above the minimum unless approved in advance by a supervisor. Salary increases announced by any manager are based on the authority of a supervisor.

It is obvious to us that none of the store managers will be deciding questions affecting the employees in the context of collective bargaining.

It is to be noted that the organization of the restaurant system in Big Boy is quite similar to that of the Alberts stores, with the Big Boy area supervisors performing much the same function as the Alberts district supervisors. Such a centralization of supervisory authority made a single-restaurant unit inappropriate, and renders the single store unit in the present case equally inappropriate.

The underlying principle on which these court decisions were grounded was well stated in Michigan Bell Telephone Company and Communication Workers of America, 192 NLRB No. 178 where, in considering the appropriateness of a single office out of many, the dissenting Board members said:

> While giving sanction to an individual office may serve the expedient purpose of making organization of employees easier, it is difficult to conceive of meaningful bargaining taking place if the employees choose to designate the petitioner as their agent for this purpose. An employer who has consistently established wage levels, fringe benefits and the entire gamut of labor relations polices on a much broader basis both for organized and unorganized groups of employees is hardly likely to be willing to let a tail this size wag the dog. (emphasis added)

In the present case all of Alberts' labor policy is determined and applied on a uniform basis. There is not a single subject of collective bargaining upon which an individual store manager may act independently. Clearly, a "tail" the size of a single store will not "wag the dog" which consists of 48 stores. A unit which cannot impact upon labor policy is disruptive to company operations and is inappropriate for both the company as a whole and the employees within the unit.

The circuit courts for the second, fifth, sixth and seventh circuits have thus held that single store units are inappropriate under factual situations virtually identical to Alberts.

Not only is the unit decision herein contrary to applicable circuit courts decisions, it is also contrary to cases where the Board itself has found a single store unit to be inappropriate. In Twenty-First Century Restaurant of Nostrand Avenue Corp., 192 NLRB No. 103 (1971), the union sought a unit consisting of one of the employer's twenty-two fast food restaurants in the New York-New Jersey area. The Board, holding a single restaurant unit to be inappropriate, cited the following factors as controlling in its decision:

1. General company policy such as merchandising, advertising and labor matters was formulated centrally by company executives.

2. The administration of labor relations matters was handled centrally.

3. Each store handled the same merchandise.

4. Each store manager had little autonomy with the exception of hiring new employees.

5. The district supervisors played an important role in store operations.

In Gray Drug Stores, Inc., and Retail Clerks Union Local 1625, 197 NLRB No. 105 (1972), the issue before the Board was whether a single store, county-wide, two county or state-wide bargaining unit would be appropriate for the employer's drug store operations. In reaching its conclusion that a two county rather than single store or single county unit was appropriate the Board listed the following factors as determinative:

1. The employees of the single store or single county did not comprise a homogeneous, identifiable and distinct group.

2. There was common supervision of employees by the district manager.

3. There was little autonomy at the single-store level.

4. There was interchange of employees between stores in the two counties.

The Board found that the individual store managers lacked authority in "personnel, labor relations, merchandising and other matters" and that the district manager played an extensive role in the store operations.

The managers of individual Gray drug stores control the day-to-day activity of their store. As is the case

with Alberts' managers, their main function is to run the store, direct the work force and maintain inventory levels. Neither the Gray managers nor the Alberts' managers play an independent role in decisions involving labor relations. They cannot discharge employees, they cannot independently hire employees and they cannot even implement work and vacation schedules without the approval of their district managers. Based on the reasoning and conclusions in Twenty-First Century and Gray, a single store unit in the present case is highly inappropriate and legally unsupportable.

From the evidence as to the duties and powers of the manager of an Alberts store, it can be seen that he lacks the authority to make substantive decisions on any issue which would be a subject of collective bargaining. In the Alberts operation, all authority to decide such issues for the Detroit metropolitan area stores is concentrated in the central office in Ferndale. Therefore, the smallest appropriate unit in the Alberts system would be one covering all twenty-four metropolitan Detroit area stores, and a unit consisting of only one of those stores is clearly inappropriate.

A unit determination can only be sustained if it is neither arbitrary nor capricious. Packard Motor Car v. NLRB, 330 US 485 (1947). As evidenced by the number of cases discussed herein, a finding of arbitrariness is not uncommon. In this case, the Board acted arbitrarily and capriciously in its failure to follow its own precedent, its failure to follow the precedent of the courts, and its failure to recognize the disruptive effect of single store units in a centralized chain. The D.C. Circuit's failure to reverse the Board's arbitrary decision results in a conflict among the circuits as to unit appropriateness, a conflict which destroys the uniformity of principles necessary for the stability of labor relations throughout the country. The determination of whether a retail chain must bargain on a single or multi-store basis cannnot be based upon the circuit in which that chain is located.

Since the union claimed to represent employees in an inappropriate unit, the management of Alberts was not under an obligation to bargain with the union, and the

charges of failure to bargain in violation of Section 8(a)(5) should have been dismissed. The D.C. Circuit's failure to dismiss the charges presents a clear basis for the Supreme Court's review on this issue.

B. Alberts No-Solicitation Rule is Not Discriminatory in its Promulgation or Application and is Identical to Other Such Rules Declared Valid.

In order to maintain efficient operations during the pendency of union campaigns, it is common for employers to institute "no solicitation" rules which limit the extent of union activities (either pro or con) in which employees may engage. Within certain limits such rules have been determined by the Board and courts to be lawful. The basic approach in cases where the validity of a particular rule is in question has been for the decision-making authority to balance the need of the employer to maintain efficiency and decorum against the restriction placed upon activities of the employees. In the field of retail enterprise an employer is granted more latitude in restricting employees' activities than are employers in other types of endeavor. The D.C. Circuit in this case affirmed the Board decision which used a very mechanical, formalistic approach in considering the rule and was therefore inconsistent with both the spirit and the letter of the applicable decisions of both the Board itself and the circuit courts.

The reason for the special rule in this area applicable to retail operations is easy enough for us to understand; the well-being of the company's business is directly related to its maintenance of customer goodwill. Further, the customers in the retail industry are personally present at the employer's premises; therefore, the conduct of the employees and their decorum while at work are very real and legitimate concerns of the employer. Accordingly, it has been well established through both Board and court decisions that a retail employer may completely prohibit solicitation in sales areas and may prohibit solicitation at all times if it interferes with selling activities. Food Store Employees Union, Local 347, Amalgamated Meat Cutters, Etc. v. NLRB, 418 F2d 1177, 1180 (D.C. Cir. 1969); Montgomery

Ward & Co. v. NLRB, 157 F2d 486 (CA 8, 1946); May Department Stores Co. v NLRB, 154 F2d 533, 537 (CA 8, 1946) Cert. denied 329 US 725.

Here, however, the Board and the D.C. Circuit erred in that they refused to view the rule in question in the way employees would view it. That is, they refused to apply a common sense, everyday approach to the meaning of the rule. Instead, the Board analyzed the rule by splitting it into various small components and finding fault with each component. The Board truly engaged in an exercise of "not seeing the forest for the trees."

Specifically, the Board in its holding on this point reached two separate conclusions each of which constitutes error of law. The first conclusion was that a prohibition of solicitation during "working hours" is invalid on its face (App. 3-5). Second, the Board concluded that despite the clarifying statement in the printed rule that the prohibition against solicitation was intended to avoid interruptions of "normal work" the reference to no solicitation on "company property" was overbroad even for a retail store. The Board, instead of reading the no-solicitation rule in its entirety to determine its real meaning, took two phrases out of context and classified the rule in neatly established categories. Thus, the Board labeled Alberts' no-solicitation rule as invalid despite the fact that its clear import is such as has been found acceptable in retail businesses.

The Board's decision (which became the decision of the D.C. Circuit without elucidation) relied upon the decision in Essex International, Inc., 211 NLRB No. 112 (1974) as a basis for its conclusion that the Alberts' no-solicitation rule is presumptively invalid. In the Essex case the Board announced a distinction between prohibitions of solicitation during "working hours" and those during "working time". The Board held that "working time" prohibitions referred to time on the floor while "working hours" referred to all time on the premises including rest and lunch periods. Despite the Board's persistence in perpetuating this meaningless

distinction, the courts prior to the D.C. Circuit herein have never supported the distinction.

In Republic Aviation Corp. v. NLRB, 324 US 793 (1945), the Supreme Court stated unequivocally that the prohibitions against solicitations during "working hours" are not presumptively invalid. The Court said at page 803:

> It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. (emphasis added)

Similarly, the D.C. Circuit, in United Steel Workers of America v. NLRB, 393 F2d 661 (D.C. Cir. 1968) stated at page 663:

> As to the notice, it is of course the province of the employer to prohibit union solicitation on company premises during "working hours". (emphasis added)

In NLRB v. F. W. Woolworth, 214 F2d 78 (CA 6, 1954), the concurring opinion of Judge Miller recognized that:

> Neither the Constitution, the common law, nor the Labor Management Relations Act confers upon employees the right to use for union purposes the property of their employer during working hours, over the objections of the employer. 147 F2d 85 (emphasis added)

Woolworth was cited with approval in NLRB v. United Steel Workers of America, 357 US 357, 364 (1958), and in TRW, Inc., TRW Michigan Division v. NLRB, 393 F2d 771, 772 (CA 6, 1968).

Other cases have also declined to make the working hours-working time distinction upon which the Board's decision is based in this case. NLRB v. WKRG-TV, Inc., 470 F2d 1302 (CA 5, 1973); NLRB v. Essex Wire Corp.,

245 F2d 589, 593 (CA 9, 1957); Bonwit Teller, Inc. v. NLRB, 197 F2d 640, 645 (CA 2), Cert. denied, 345 US 905 (1952); Olin Industries, Inc. v. NLRB, 191 F2d 613, 617 (CA 5), Cert. denied, 343 US 919 (1951); NLRB v. Montgomery Ward & Co., 157 F2d 486, 494 (CA 8 1946); NLRB v. May Dept. Stores Co., 154 F2d 533, 538 (CA 8) Cert. denied, 329 US 725 (1946); NLRB v. Edinburg Citrus Ass'n., 147 F2d 353, 356 (CA 5, 1945); NLRB v. William Davies Co., 135 F2d 179, 182 (CA 7), Cert. denied, 320 US 770 (1943).

The Board in this case relied upon a single court decision [Int'l Union of Electrical Workers v. NLRB, 434 F2d 473 (D.C. Cir., 1970)] in support of the working hours-working time distinction suggested in Essex International, supra. The Board's reference to that case was both misleading and erroneous as the court in Int'l Union of Electrical Workers, supra, did not give credence to the distinction the Board suggested; that decision stands solely for the proposition that a rule prohibiting solicitation during "working time" is valid. There was no mention of the term "working hours." Prior to the decision in this case no court had ever adopted the Board's tenuous distinction. Employers, employees and unions alike must have some degree of certainty with respect to the validity of any form of work rules. The distinction sought by the Board in this case is so subtle that by necessity uncertainty is created and inequity promoted.

The determination that Alberts' rule is invalid per se is also based upon the conclusion that its applicability to "company property" is too broad. There is no basis for a finding that a rule is invalid because of the reference to "company property". Again, the Board applies its "catch-phrase" approach, entirely overlooking reality. The no-solicitation rule, as acknowledged by the Board, clearly states that the purpose of the rule is to avoid interruption of "normal work". Since work can, by definition, only be conducted in working areas, the intent of the rule is clear: there can be no solicitation in work areas while the store is open for business. This clearly constitutes a permissible, non-discriminatory rule. The fact that there was no evidence offered of enforcement of the rule in non-work areas and there was no evidence

offered that any employee was confused by the rule demonstrates that everyone understood the purpose behind the rule: avoid disrupting the selling operations in Alberts stores.

Certainly, if this Court were to unreasonably extract the sentence "during working hours on company property," without considering the rule in its entirety, it too could conclude as the Board and apparently the D.C. Circuit did that the rule prohibits solicitation in non-work areas. If, however, the entire rule is read, particularly the passage stating that employees may discuss the union as long as "their discussions do not interrupt their normal work", it is clear that the prohibition is limited to work areas of the store. Such a prohibition is presumptively valid.

Once it is determined that the no-solicitation rule is presumptively valid, the 8(a)(1) charge must be dismissed as there is no evidence that the rule was promulgated for a discriminatory purpose or applied in a discriminatory manner. The only instance in which the rule was enforced was initiated by an employee whose selling activity was disrupted by another employee soliciting a union authorization card. This is exactly the type of activity which Alberts sought to prohibit and which the Board and courts have held is justifiably prohibited.

Alberts promulgated the no-solicitation rule because prior experience indicated that union organization can cause business disruption (App. 46, 47). There is no evidence that Alberts tried to hinder organizational activity. In fact, such activity was so successful that in the only election held to date (Universal store) the union won by a 17-5 margin. Obviously, the union was not in any way stymied in its efforts to get its message across.

When one examines this rule in its entirety, with an eye to its actual meaning to store employees, one must conclude that the rule does indeed properly strike that balance between the employer's interests and the union's. This is the type of rule which should be upheld rather than labeled "presumptively invalid". The scope of the rule is clear, the law is clear and the resultant conclusion

is clear: the no-solicitation rule is valid on its face. The D.C. Circuit's refusal to recognize the validity of the rule is contrary to every other circuit court decision and creates an issue for which Supreme Court review is both appropriate and essential to the field of labor relations.

CONCLUSION

The appropriateness of a collective bargaining unit is a critical issue in labor relations law. The circuit courts have consistently held that a single store unit is inappropriate in a chain where operations and labor relations are centrally handled. It is particularly inappropriate where, as here, we are dealing with a single metropolitan area. In the present case the D.C. Circuit departed from this well-established principle and created a distinct split among the circuits. The creation of the split leads to the unacceptable result that unit decisions will no longer be consistent and will depend entirely upon the circuit that hears the case.

The D.C. Circuit further erred in its adoption of a standard for "no-solicitation" rules which has been universally rejected by the courts of this country. Employers and employees must have a degree of certainty as to permissible conduct during a union campaign in a retail setting. The newly created split of the circuits results in ambiguity which can only lead to chaotic labor relations, a situation which the Supreme Court has long sought to eliminate.

The two issues in this case are of national significance to the law of labor relations. The D.C. Circuit has created these critical issues by deviating from the overwhelming majority views of the other circuits. For this reason, we request that the Supreme Court grant a writ of certiorari to review the two issues raised in this petition.

Respectfully submitted,

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